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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

MATTHEW JOSIAH RICHARDSON,

Defendant and Appellant.

E063552

(Super.Ct.No. FWV1401847)

OPINION

APPEAL from the Superior Court of San Bernardino County. Colin J. Bilash,
Judge. Affirmed.

Paul J. Katz, under appointment by the Court of Appeal, for Defendant and
Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney
General, Julie L. Garland, Assistant Attorney General, Eric Swenson, Barry Carlton, and
Teresa G. Torreblanca Deputy Attorneys General, for Plaintiff and Respondent.

A jury found defendant and appellant Matthew Josiah Richardson guilty of resisting, obstructing, or delaying a peace officer. (Pen. Code, § 148, subd. (a)(1), count 2.)¹ A trial court placed him on probation for a period of three years under specified conditions.

On appeal, defendant contends that the court erred in denying his *Pitchess*² motion without conducting an in camera hearing. We affirm.

FACTUAL BACKGROUND

Officer Jorge Velasquez responded to a call regarding a suspect who was breaking into cars. When he arrived at the scene, he instructed defendant to come toward him so he could talk to him. Defendant walked over and appeared to be under the influence. Officer Velasquez told defendant to turn around and place his hands behind his back, so he could do a cursory search for weapons. For officer safety, Officer Velasquez grabbed defendant's hands and started the patdown search. Defendant got upset as soon as the officer put his hands on him. Defendant tensed up, moved his left shoulder and arm, and pulled his hand away from Officer Velasquez's grasp. Officer Velasquez thought defendant either wanted to fight him or escape. So, he held on to defendant's other hand, grabbed his shoulder, and brought him down to the ground to gain control of him.

¹ All further statutory references will be to the Penal Code, unless otherwise noted.

² *Pitchess v. Superior Court* (1974) 11 Cal.3d 531 (*Pitchess*).

Defendant started swinging his arms violently and would not follow Officer Velasquez's instructions to put his hands behind his back. Officer Velasquez repeatedly told him to stop resisting, but defendant grabbed his vest. Officer Velasquez was in fear for his safety so he punched defendant in the face. Defendant still would not comply. Other officers arrived at some point, and one of them yelled, "Taser." Officer Velasquez backed off, and another officer used a taser gun on defendant. Defendant continued to fight and resist. Since the taser did not appear to be effective on defendant, Officer Velasquez released his K-9 dog. Velasquez continued to tell defendant to stop resisting and warned him that the dog would bite him. The dog bit defendant's leg. Defendant began to punch and choke the dog, so the dog let go. Defendant continued to swing and punch. Officer Velasquez directed the dog to bite defendant again, and when it did, the officers were able to handcuff him.

ANALYSIS

The Trial Court Properly Denied the *Pitchess* Motion

Prior to trial, defendant filed a *Pitchess* motion alleging that Officer Velasquez used excessive force during his detention and arrest, and that he falsified police reports. Defendant sought the discovery of Officer Velasquez's personnel records pertaining to any similar conduct. The court denied the motion. Defendant now argues that the court erred in denying it since he presented a plausible factual scenario that Officer Velasquez used excessive force. We conclude that the court properly denied the motion.

A. *Pitchess* Motion

Defendant filed a *Pitchess* motion alleging that Officer Velasquez used excessive force when he detained and arrested him. In support of the motion, defense counsel submitted a declaration, the preliminary hearing transcript, and police reports. In defense counsel's declaration, he relied on Officer Velasquez's preliminary hearing testimony, noting that Officer Velasquez testified that defendant starting twitching when he put his hands on him to grab him, and defendant made a fist and shrugged his shoulder; then Officer Velasquez took him to the ground. He further noted Officer Velasquez's testimony that when defendant was on the ground, he was kicking and throwing his arms everywhere. Defense counsel denied that defendant made a fist, shrugged his shoulder, or resisted Officer Velasquez, and he contended that excessive force was used against defendant when Officer Velasquez took him to the ground. He further averred that any force used by defendant was subsequent to Officer Velasquez using excessive force against him.

At the hearing on the *Pitchess* motion, defense counsel stated that he had presented a plausible factual scenario of excessive force in denying that defendant clenched his fist and pulled his shoulders back. He argued that the police brought defendant to the ground, and based on defendant's denial that he used any force against the officer or resisted him, the force used against him by the officer was excessive, as was the release of the K-9 dog and the use of the taser gun. The court responded, "Every *Pitchess* motion coming before the Court is a denial by the defendant of what the officer

said. If the standard was simply a denial by a defendant, every case would be opened to a review of the discovery requested. [¶] . . . [¶] The declaration supplied doesn't say anything that [defendant] said. There is no scenario at all here.” The court further stated, “[W]hat you've presented is not a different factual scenario. You're just saying: The officer used excessive force. It's too general; it's too broad. [¶] . . . [¶] The only thing I see you presenting is a denial. In this whole declaration, there's one thing, 'he didn't clench his fists.’” Defense counsel disagreed and asserted that he was asking the court to grant the motion based on that denial, along with all the other statements about the force the officer used. After further discussion, the court concluded, “[B]ased on what's presented, this is just a denial of what's been claimed by the police and doesn't rise to the level that the Court needs to make an inquiry. Therefore, the *Pitchess* Motion will be denied.”

B. The Court Properly Denied Defendant's Motion

“To initiate discovery, the defendant must file a motion supported by affidavits showing ‘good cause for the discovery,’ first by demonstrating the materiality of the information to the pending litigation, and second by ‘stating upon reasonable belief’ that the police agency has the records or information at issue. [Citation.] This two-part showing of good cause is a ‘relatively low threshold for discovery.’ [Citation.]” (*Warrick v. Superior Court* (2005) 35 Cal.4th 1011, 1019 (*Warrick*)). “[O]n a showing of good cause, a criminal defendant is entitled to discovery of relevant documents or information in the confidential personnel records of a peace officer accused of

misconduct against the defendant. [Citation.]” (*People v. Gaines* (2009) 46 Cal.4th 172, 179.)

“[D]efense counsel’s declaration in support of a *Pitchess* motion must propose a defense or defenses to the pending charges.” (*Warrick, supra*, 35 Cal.4th at p. 1024.)

“Counsel’s affidavit must also describe a factual scenario supporting the claimed officer misconduct. That factual scenario, depending on the circumstances of the case, may consist of a denial of the facts asserted in the police report.” (*Id.* at pp. 1024-1025.) “In other cases, the trial court hearing a *Pitchess* motion will have before it defense counsel’s affidavit, and in addition a police report, witness statements, or other pertinent documents. The court then determines whether defendant’s averments, ‘[v]iewed in conjunction with the police reports’ and any other documents, suffice to ‘establish a plausible factual foundation’ for the alleged officer misconduct and to ‘articulate a valid theory as to how the information sought might be admissible’ at trial. [Citation.]

What the defendant must present is *a specific factual scenario of officer misconduct that is plausible when read in light of the pertinent documents.*” (*Id.* at p. 1025, italics added.)

“[A] plausible scenario of officer misconduct is one that might or could have occurred.

Such a scenario is plausible because it presents an assertion of specific police misconduct that is both internally consistent and supports the defense proposed to the charges.” (*Id.* at p. 1026.) “A motion for discovery of peace officer personnel records is addressed to the sound discretion of the trial court, reviewable for abuse.” (*Alford v. Superior Court* (2003) 29 Cal.4th 1033, 1039.)

In *People v. Sanderson* (2010) 181 Cal.App.4th 1334 (*Sanderson*), two police officers went to investigate a report that the defendant had made threats. While at the victims' home, they heard a telephone call made by the defendant to the victims. The speakerphone was on, and during the phone call, the defendant threatened to kill the victims. Defendant was charged with making criminal threats. (*Id.* at p. 1337.) Prior to trial, the defendant filed a *Pitchess* motion seeking disclosure of the personnel records of the two officers, specifically of any documents pertaining to dishonesty and falsifying police reports. The defense counsel attached a declaration, stating his belief that one of the officers had falsified information in his report of the incident. The police report stated that both officers heard the defendant make threats while on the speakerphone. The defendant denied making the statement attributed to him by the reporting officer. Thus, defense counsel averred that records of the officers' dishonesty would disprove that the statement was made. (*Id.* at p. 1338.) The People argued that the defendant's factual scenario was not plausible and that his request was overbroad. The court denied the motion without conducting an in camera review of the files, stating: "[T]he concern of the Court is that if this were to constitute a plausible basis for release of these records, then any time a defendant says, 'I didn't say that,' their peace officer records concerning dishonesty would be discoverable, and I do not believe for one moment that's what this case law contemplates. This is merely a credibility question. [¶] The officer says, 'This is what I heard.' [¶] The defendant saying, 'I never said that.' [¶] If that could be the basis for a *Pitchess* motion to discover records, that could happen in every single case.

And, as such, I do believe it is overbroad. I don't believe it's adequately supported by factual details which would make the records pertinent or discoverable under the *Pitchess* procedure. As such, the motion to disclose is denied.'" (*Id.* at p. 1339.)

This court affirmed the denial, concluding that it was reasonable for the trial court to conclude that the defendant failed to demonstrate sufficient good cause. We noted that the defendant "simply denied making the statement attributed to him," but he did not deny making the phone call or talking to the victims while the police were at their house. (*Sanderson, supra*, 181 Cal.App.4th at pp. 1340-1341.) We concluded that the defendant failed to present "'an alternate version of the facts'" regarding the reason and nature of his phone call. (*Id.* at p. 1341.) Therefore, the trial court acted within its discretion in making a "'common sense'" determination that the defendant's version of events "was not plausible 'based on a reasonable and realistic assessment of the facts and allegations.'" (*Ibid.*)

Here, the trial court could reasonably conclude that defendant failed to demonstrate good cause. To establish a plausible factual foundation, defendant was required to present "a specific factual scenario of officer misconduct that is plausible when read in light of the pertinent documents." (*Warrick, supra*, 35 Cal.4th at p. 1025.) Similar to *Sanderson*, defendant failed to present an alternate version of the facts; rather, he simply denied the elements of the offense charged. (See *People v. Thompson* (2006) 141 Cal.App.4th 1312, 1317.)

Furthermore, the police reports that were attached to defendant's *Pitchess* motion contradicted his denial. Officer Velasquez's report contained a witness statement from Jesus Cardenas, in which Cardenas reported that defendant had tried to enter his godson's house. Cardenas stopped defendant from coming inside and then watched him walk across the street and get into various parked cars. Cardenas saw the police arrive and stated that defendant immediately began acting uncooperatively. The officers tried to grab hold of him, but he began fighting with them, swinging his hands violently. Cardenas said the officers told him to put his hands behind his back, but defendant refused to follow instructions. Officer Leonard Sein's report stated that when he arrived at the scene, he saw Officer Velasquez trying to detain defendant. He saw defendant attempt to pull away from Officer Velasquez as his hands were behind his back. Officer Velasquez then took defendant to the ground and, while on the ground, defendant violently fought the officers. Officer Sein further reported that he commanded defendant to get on his stomach and place his hands behind his back, but defendant continued to resist and tried to stand up. Therefore, Officer Sein deployed his taser gun. Officer Michael Ernes similarly reported that when he arrived at the scene, he heard verbal commands being given to "stop resisting." He saw defendant "flailing his arms wildly as he broke free from an officers grasp." Officer Ernes also reported that defendant started to stand up, but was forced back to the ground by an officer. Ernes grabbed defendant's arm, pulled him to the ground, and tried to take a "back mount position," but defendant was able to pull away and slide out from under him. At that point, the taser gun was

deployed. However, it appeared to be ineffective, as defendant “was spinning on the ground, kicking and continually trying to avoid being arrested.” Officer Shawn Michels also filed a report, which stated that when he arrived at the scene, he too noticed several officers trying to restrain defendant, as he was kicking his legs and swinging his arms. Officer Michels said he could hear them yelling at defendant to stop fighting and place his hands behind his back, but defendant ignored their commands and continued to fight. He reported that, even after being handcuffed, defendant was combative with paramedics and had to be restrained. Defendant was transported to the hospital, and there, he told Officer Michels that he had smoked a combination of ecstasy and methamphetamine, and that it was “very possible” that he pulled away from the officers before they handcuffed him. Defendant said that he did not like how they approached him, so he started to “tussle” with them. Defendant told Officer Michels he heard their commands to stop fighting, but he “felt he could defend himself.”

The court determines “whether defendant’s averments, ‘*[v]iewed in conjunction with the police reports*’ and any other documents, suffice to ‘establish a plausible factual foundation’ for the alleged officer misconduct.” (*Warrick, supra*, 35 Cal.4th at p. 1025, italics added.) In view of the police reports here, we conclude that defendant’s averments did not suffice to establish a plausible factual foundation. (*Ibid.*)

Defendant relies upon *Warrick, supra*, 35 Cal.4th 1011, in asserting that “a plausible scenario *can* consist of a defendant’s denial showing that his defense might have occurred.” *Warrick* does state that a factual scenario “may consist of a denial of the

facts asserted in the police report,” depending on the circumstances of the case. (*Id.* at pp. 1024-1025.) However, it further states that “[i]n other cases, the trial court hearing a *Pitchess* motion will have before it defense counsel’s affidavit, and in addition a police report, witness statements, or other pertinent documents,” and that a defendant’s specific factual scenario must be plausible when read in light of the pertinent documents. (*Id.* at p. 1025, italics added.) As demonstrated *ante*, defendant’s denial was not plausible when read in light of the police reports.

Defendant also cites *People v. Hustead* (1999) 74 Cal.App.4th 410 (*Hustead*), but *Hustead* is distinguishable. In that case, a defendant facing a charge of felony evasion of arrest brought after a high-speed chase sought *Pitchess* discovery of documents showing whether the pursuing officer had a history of fabricating facts in police reports. (*Id.* at p. 416.) In support of the motion, the defense declaration denied that the defendant had driven in the reckless manner described by the officer and that his driving route was different than that found in the report. The court concluded that the allegations were sufficient to “establish a plausible factual foundation” for an allegation that the officer made false accusations in his report. (*Id.* at p. 417.) Thus, the defendant demonstrated good cause for the requested discovery, and the trial court abused its discretion by failing to hold an in camera hearing. (*Id.* at p. 418.)

Contrary to the circumstances of the present case, the defendant in *Hustead* did not merely deny the elements of the charged crime. The defendant presented a plausible alternative factual scenario. (*Sanderson, supra*, 181 Cal.App.4th at p. 1342.) The officer

testified that the defendant ran numerous stop signs, failed to slow through intersections, nearly hit two cars and two pedestrians, was traveling at speeds in excess of 60 miles per hour, and finally slid out of control into a center divider. (*Hustead, supra*, 74 Cal.App.4th at p. 413.) The defendant testified that he drove safely throughout the pursuit, took precautions to avoid any accidents, and did not almost collide with two cars. (*Id.* at pp. 414-415.) He also testified that there were no pedestrians on the street. Furthermore, his defense counsel asserted that his driving route was different than what the police had reported. (*Id.* at p. 417.) Unlike the defendant in *Hustead*, defendant here did not present a plausible alternative factual scenario.

We further note that, although defendant here claims that “[i]t was only after Velasquez escalated his amount of force did [he] begin resisting,” he previously admitted to the police that it was “very possible” he pulled away from the officers. He told Officer Michels he did not like how they approached him, so he started to “tussle” with them. Moreover, defendant admitted that he heard their commands to stop fighting, but he “felt he could defend himself.”

We conclude that defendant failed to show good cause for the discovery. Thus, the trial court did not abuse its discretion in denying his *Pitchess* motion.

DISPOSITION

The judgment is affirmed.

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HOLLENHORST
J.

We concur:

RAMIREZ
P. J.

MILLER
J.